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NEW DELHI, MONDAY, AUGUST 24, 1953

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 10th August 1953

S.R.O. 1617.—Whereas the election of Shri Vivekanand Gir, as a Member of the Legislative Assembly of the State of Bihar, from the Runisaidpur constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Ratneshwarinandan Sinha, son of Shri Lakshminandan Sinha, Village and P.O. Sheohar, at present Chairman, District Board, Muzaffarpur;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

Now, therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION TRIBUNAL, PATNA

PRESENT:

Shri Basu Prasad, Retired District Judge, *Chairman*.

Shri Hargobind Prasad Sinha, Retired District Judge, *Member*.

Shri Aditya Narayan Lal Advocate, *Member*.

ELECTION PETITION No. 174, OF 1952

In the matter of election to the Bihar State Legislative Assembly from Runisaidpore Constituency in the district of Muzaffarpur.

Shri Ratneshwari Nandan Sinha, son of Shri Lakshminandan Sinha, village and P.O. Sheohar, at present, Chairman District Board, Muzaffarpur—*Petitioner*.

Versus

1. Shri Vivekanand Gir, son of Chintaman Jha, village and P.O. Manikchawk, District Muzaffarpur,
2. Shri Ramchander Gaur, son of Mahadeo Saran Lal, village Gidhaphulbaria, P.O. Dumra, District Muzaffarpur,
3. Shri Murat Prasad Shrivastav (pleader), village and P.O. Partapur, District Muzaffarpur, at present Civil Court, Muzaffarpur,
4. Shri Girjanandan Prasad Singh, son of Kallashpati Narain Singh, village and P.O. Athri, District Muzaffarpur,
5. Shri Ramchander Prasad Sinha (pleader), son of Kaloo Singh, village Basudeo, P.O. Bedaul, at present Sitamarhi Court, District Muzaffarpur—*Respondents*.

For the Petitioner—

1. Shri B. P. Samaiyar,
2. Shri B. P. Sinha—*Advocates*.

For Respondent No. 1.

1. Shri B. C. Ghosh,
2. Shri B. K. Sen,
3. Shri K. P. Varma,
4. Shri A. K. Chaudhury—*Advocates*.

Shri Ratneshwari Nandan Sinha, who was a duly nominated candidate for election to the Bihar Legislative Assembly from Runisaïdpur Constituency, in the district of Muzaffarpur has filed this election petition under section 81 of the Representation of the People Act, 1951

The petitioner alleges that he and respondents No. 1 to 5 had presented their respective nomination papers for election to the Bihar Legislative Assembly from the aforesaid constituency; that, after holding scrutiny of the nomination papers, the Returning Officer accepted the nomination of the petitioner and the respondent that, subsequently, respondents Nos. 4 and 5 withdrew their candidatures; that the petitioner and respondents No. 1 to 3 went to the Polls with the result that respondent No. 1, having secured the largest number of votes, was declared elected. It is said that respondent No. 1 secured 10,108 votes, whereas the petitioner polled 9320 votes. Respondents Nos. 2 and 3 secured less votes than respondent No. 1 and the petitioner.

The petitioner challenges the election of respondent No. 1 on the ground of the improper acceptance of the latter's nomination by the Returning Officer, whereby the result of the election has been materially affected. It is alleged that respondent No. 1 was disqualified for being chosen as a member of the Bihar Legislative Assembly in as much as he was, at the relevant time, interested in a contract for the execution of a work, namely, excavation of Bhandari tank in village Manikchawk, P. S. Runisaïdpore, undertaken by the State Government.

The petitioner has, in his election petition, challenged the election of respondent No. 1 on certain other grounds also. One of such grounds is that respondent No. 1 being an Udasi Sanyasi, has not acquired the status of citizen of India and is, consequently, not qualified to stand for election. The next ground is that the name of respondent No. 1's father is Chintaman Jha, but respondent No. 1 wrongly described Mahanth Vijayanand Gir as his father in the nomination paper. The last ground is that respondent No. 1 has not filed the Return of Election Expenses, as required by law. At the time of hearing, however, these grounds were not pressed by the petitioner.

On the allegations stated above, the petitioner prays (a) for a declaration that the election is wholly void, and alternatively (b) for a declaration that the election of respondent No. 1 is void and that the petitioner has been duly elected.

The election petition is resisted by respondent No. 1 who has filed a written statement denying that he had, at the relevant time, interest in any contract for execution of work undertaken by the State Government. He says that the alleged excavation work was done under the Famine Relief Code and Rules and Regulations governing Famine Relief Work by the Gram Panchayat of the village and that the Gram Panchayat was under a Statutory obligation to do that work. He, further, says that he as the elected Mukhia of the Gram Panchayat, represented the Panchayat in all matters, agreements and transactions with which the Panchayat was concerned. He also says that the work of excavation of Bhandari tank had been completed long before the date of filing of the nomination paper by him and that no such work was subsisting on that date. He, therefore, contends that he was not disqualified for being chosen as a member of the Bihar Legislative Assembly and that his nomination was rightly accepted. Other allegations of the petitioner are also denied by respondent No. 1.

Respondent No. 1 has filed an additional written statement contending that one Shri Pradip, one of the duly nominated candidates, is a necessary party to the proceeding, but as he has not been made a party, the election petition is not maintainable.

Respondent No. 4 has filed a written statement supporting the petitioner's case. On the above pleadings, the following issues were framed.

ISSUES

- (1) Is the election petition as framed maintainable?
- (2) Was the Respondent No. 1 qualified to be chosen to fill a seat in the Bihar Legislative Assembly?
- (3) Was the Respondent No. 1 disqualified for being chosen as, and for being a member of the Bihar Legislative Assembly?
- (4) Was the nomination of the Respondent No. 1 improperly accepted? If so, has the result of the election been materially affected by such acceptance?
- (5) Did the Respondent No. 1 file return of election expenses as required by law? If not, what will be the legal effect?
- (6) Is the election in the constituency in question wholly void?
- (7) Is the election of Respondent No. 1 void?
- (8) Is the petitioner entitled to a declaration that he has been duly elected?
- (9) To what relief, if any, is the petitioner entitled?

FINDINGS

Issue No. 1.—The learned advocate for respondent No. 1 has challenged the maintainability of the election petition on 3 grounds, namely:—(1) that the election petition has not been signed by the petitioner as required by section 83(1) of the Representation of the People Act, 1951, (ii) that relief claimed by the petitioner is not in accordance with the provisions of Section 84 of the Act, (iii) that the requirement of section 82 of the Act has not been complied with.

As regards the first ground, it appears that originally the signature of the petitioner at the foot of the election petition was wanting, although his signature appeared below the verification. On the petitioner's filing a petition for permission to remove the defect, the Tribunal, by its order dated 4th June, 1953, permitted him to sign the election petition holding the view that, in the circumstances of the case the omission was a mere irregularity which was capable of being cured. The petitioner, accordingly, signed the election petition. The defect having been removed, there is, now, no force in the contention that the election petition is not maintainable for want of the signature of the petitioner.

The petitioner, as has been stated above primarily seeks the relief that the election be declared to be wholly void, and in the alternative, he seeks a declaration that the election of respondent No. 1 is void and that the petitioner has been duly elected. The primary relief is contemplated by clause (C) and the alternative relief by Clause (b) of Section 84 of the Act. The grant of relief will depend upon the facts proved, warranting such grant. We do not consider that the claim to the alternative relief, contemplated by Clause (b), makes the election petition nonmaintainable in the eye of the law. The second ground, therefore, also fails.

As regards the third ground, the matter requires a very careful consideration. The respondent's objection is that one Shri Pradip, who was a duly nominated candidate, has not been made a party to this proceeding and, consequently, the election petition is not maintainable. It is not disputed that Shri Pradip had filed a nomination paper (Ext. B) on 24th November 1951 and that on 28th November 1951, the date fixed for scrutiny of the nomination papers, the nomination of Shri Pradip was accepted. It appears that Shri Pradip, subsequently, withdrew his candidature and did not contest at the election.

Section 82 of the Representation of the People Act, 1951, provides "A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated". Two questions, therefore, arise for decision, (1) Whether Shri Pradip was a duly nominated candidate? (2) If so, is the election petition maintainable in his absence?

The term, "duly nominated candidate", has not been defined any where in the Act or in the Rules framed under the Act. We, however, find the definition of "validly nominated candidate" in Rule 2, Sub-Rule (1), Clause (f) of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1951. Clause (f) says that "Validly nominated candidate" means a candidate who has been duly nominated and has not withdrawn his candidature in the manner and within the time specified in certain sections of the Act.

Sub-section (3) of section 33 of the Act, however, provides that no candidate shall be deemed to be duly nominated unless his nomination paper is accompanied by certain declarations required under the Act and the Rules. For the purposes of

this case, the relevant declarations relate to the appointment of election agent and to the choice of symbols. Section 34 of the Act provides that a candidate shall not be deemed to be duly nominated unless he deposits certain sum of money at the time of filing the nomination paper. If the requirements of sections 33 and 34 are complied with and if the other conditions contemplated by Clauses (a), (b), (c) and (e) of section 36 (2) are fulfilled, the Returning Officer can accept the nomination of a candidate. It may be mentioned that Clause (a) deals with qualification of a candidate to stand for election, Clause (b) with disqualification of a candidate from standing for election, Clause (c) with disqualification of a proposer or seconder from subscribing a nomination paper, and Clause (e) with the signature of the candidate or proposer or seconder being genuine, or not being obtained by fraud. Upon examination of Sections 33, 34 and 36, it will appear that a duly nominated candidate is one whose nomination has been accepted by the Returning Officer after scrutiny under section 36. The term, "duly nominated candidate" includes those candidates also who have, subsequently, withdrawn their candidatures. A "duly nominated candidate", who has not withdrawn his candidature and who goes to the Polls, becomes a validly nominated candidate; but if a duly nominated candidate withdraws his candidature, he does not acquire the status of a "validly nominated candidate", but continues to be a "duly nominated candidate".

In the present case, as stated above, Shri Pradip's nomination was accepted by the Returning Officer, but, subsequently, he withdrew his candidature. There can be no doubt that he was a duly nominated candidate and we find accordingly.

Shri Pradip has not been made a respondent to this proceeding and, therefore, there has not been compliance with the requirement of Section 82 of the Act. Section 82 has been reproduced above. The word "Shall" in the section means "Must". This is the plain dictionary and Grammatical meaning of the word as used in the section. The word "Shall" has to be distinguished from the word "May" which occurs in Order 1, Rule 3, Code of Civil Procedure.

Order 1, Rule 3, runs as follows:—"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise". The use of the word "may" in Order 1, Rule 3, gives discretion to a plaintiff to choose his defendants. He can make only those persons defendants to the suit against whom he seeks relief and the suit, as provided by Order 1, Rule 9, cannot be defeated simply on the ground of non-joinder of parties. It is note-worthy that all these provisions of the Code of Civil Procedure relate to "proper parties", and not to "necessary parties". Even under the Code of Civil Procedure, when a necessary party is not joined within the time prescribed by law, the whole suit is liable to be dismissed.

The Representation of the People Act is a special statute and the framing of election petition and presentation of election petition are to be governed strictly by the provisions prescribed by the Act, namely, sections 80 to 85 in Chapter II of Part VI of the Act. So far as the trial of election petition is concerned, provisions are made in Chapter III of Part VI and Section 90(2) in Chapter III lays down that, subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. It seems to us clear that the matters of framing of election petition and presentation of election petition are not to be governed by the provisions of the Code of Civil Procedure, but are to be governed by the provisions of Chapter II of Part VI of the Act of 1951.

Giving the plain dictionary and Grammatical meaning of the word "Shall" used in Section 82, there is no doubt in our mind that it was mandatory upon the petitioner to make Shri Pradip a respondent to the election petition and that the matter was not left to his choice. In other words Shri Pradip, who was a duly nominated candidate, was a necessary party according to the clear provisions of the Act.

Now let us consider what will be the legal effect of non-compliance with the mandatory provisions of section 82 of the Act. Section 80 of the Act lays down "No election shall be called in question except by an election petition presented in accordance with the provisions of this Part". The election petition before us has not been presented in accordance with the provisions of Part VI, in such as the requirement of section 82 in Part VI has not been complied with. It is, therefore, not an election petition within the meaning of section 80 and so the election cannot be called in question by

means of such defective election petition. The use of the word "Shall" in section 80 indicates that the provisions of that section are also mandatory. We do not agree with the contention of the learned advocate for the petitioner that a part of section 80, namely, "No election shall be called in question except by an election petition" is mandatory, whereas the remaining part, namely, "presented in accordance with the provisions of this Part" is merely directory.

Our attention has been drawn to section 85 and section 90(4) of the Act. Section 85 provides "If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition". Section 90(4) contains similar provisions. It lays down "Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117". Section 81 refers to the form of election petition and the time within which it is to be filed; section 83 deals what election petition shall contain; and section 117 requires deposit of security and enclosing with election petition receipt showing such deposit.

It has been vehemently argued on behalf of the petitioner that the power to dismiss an election petition for non-compliance with the requirement of section 82 has not been specifically provided in the Act and so neither the Election Commission, nor the Election Tribunal, can dismiss an election petition on this ground. We are not prepared to accept this argument in toto. Power has been given to the Election Commission, to whom an election petition is presented, to dismiss, *in limine*, the petition for non-compliance with the provisions of section 81, section 83 or section 117, for the Election Commission can easily find out, upon perusal of the election petition, whether the requirements of the aforesaid sections have been complied with or not. But the same cannot be predicated of the requirement of section 82. It may not appear on the face of the election petition that a duly nominated candidate has been left out and it may be necessary to make inquiry as to who were the duly nominated candidates. The burden of such inquiry has not been laid on the Election Commission within the scheme of the Act, but it has been left to the Tribunal to make such inquiry, if necessary. It is for this reason that Section 82 does not find place in the body of section 85. According to the scheme of the Act, the Election Commission is required to transmit to the Election Tribunal the election petition presented to it, without considering whether all the necessary parties are joined in the petition or not.

Then there may arise a case, where the Election Commission has failed to exercise its power of dismissal under section 85 and objection to the maintainability of the election petition on the ground contemplated by section 81, section 83 or section 117 is taken before the Tribunal. To meet such contingency, power has been given to the Election Tribunal to enter into the same question under section 90(4). When a statute gives power specifically to an authority to do an act, it, by implication, says that no other authority can exercise that power. In the present case, the Statute empowered the Election Commission to dismiss an election petition, *in limine*, on certain grounds. It, by implication, forbade another authority, namely, the Election Tribunal to exercise that power. It, therefore, became necessary to make special provisions in section 90(4), empowering the Election Tribunal also, to dismiss an election petition on the same grounds.

In our view, it was not necessary for the Legislature to provide specifically that an election petition shall be dismissed for non-compliance with the requirement of section 82. Power of dismissal is inherent in the mandatory provisions of section 82 itself and section 98(a) provides that the Tribunal can make an order dismissing an election petition. The Tribunal can dismiss an election petition on various grounds, one of them being non-compliance with the mandatory provisions of section 82.

If the view, that the provisions of section 82 are mandatory, is accepted—and the view cannot but be accepted upon the plain reading of the section—it becomes unnecessary to investigate what interest a duly nominated candidate, who has withdrawn his candidature, has in the election dispute and why he should be deemed a necessary party. It may however, be mentioned that it is quite conceivable that a duly nominated candidate may have withdrawn his candidature in view of a particular candidate's nomination being accepted or rejected. If that acceptance or rejection is challenged by an election petition, then the candidate, who has withdrawn his candidature, may be interested in seeing that the acceptance or rejection is not set aside. He is, therefore, a party interested in the election dispute.

It has been contended by the learned advocate for the petitioner that, if the provisions of section 82 are held to be mandatory, no reasonable interpretation can be had of the provisions of section 90(1). Section 90(1) provides that within

14 days of the publication of the election of the election petition in the official Gazette, any other candidate can come forward and apply to be joined as a respondent on furnishing security under section 119. It has been contended that the expression, "Any other candidate", includes a duly nominated candidate who is not already a respondent. It has been, further, contended that if the election petition is vitally defective for non joinder of a duly nominated candidate, it is absurd to think that such a candidate can, later on, be made a respondent on his application and on furnishing security. It has been, therefore, urged that the provisions of section 82 are not mandatory. This argument is based on the assumption that "Any other candidate" in section 90(1) includes a duly nominated candidate. The meaning of the expression "Any other candidate", keeping in view the provisions of section 82, should be a candidate other than a candidate who claims to have been duly nominated within the meaning of section 79(b). This is the only reasonable meaning of the expression "Any other candidate" in section 90(1), or otherwise an absurd interpretation will have to be put of the provisions of that section. It is, certainly, absurd to think that, whereas section 82 requires a petitioner to join as respondents to his petition all the duly nominated candidates, section 90(1) will impose a kind of penalty upon a duly nominated candidate by requiring him to furnish security, if he, in the event of his not being made a party by the petitioner, applies, some days later, to be joined as a respondent. We are, therefore inclined to hold that there is nothing in Section 90(1) which may support the contention that the provisions of section 82 are not mandatory.

After careful consideration of all the matters involved in this question, we come to the conclusion that the provisions of section 82 are imperative and mandatory and the present election petition is not maintainable for the reason of non-compliance with the said provisions.

Issue No. 2.—The allegation in the election petition that respondent No. 1 was not a citizen of India and was, consequently, not qualified to stand for election, has not been pressed. This issue is therefore, answered in the affirmative.

Issue No. 3.—The allegation of disqualification of respondent No. 1 for being chosen as a member of the Bihar Legislative Assembly is based upon the provisions of section 7(d) of the Representation of the People Act, 1951. The relevant portion of this section, for the purposes of this case, reads as follows:—"A person shall be disqualified for being chosen as a member of the Legislative Assembly of a State, if he has any share or interest in a contract for the execution of any works undertaken by the appropriate (State) Government". Before framing the questions that arise for determination in connection with this issue it will be useful to state certain facts which are either admitted or proved beyond controversy.

There was a tank in village Manikchouk, known as Bhandari tank. The tank had gone out of repairs and, in April, 1951, the Grow More Food Officer of Sitamarhi inspected the tank and recommended its repairs to the Subdivisional officer, Sitamarhi, stating in his recommendation that the tank, if repaired, would considerably help in irrigating the adjacent plots. In that year, Government apprehended scarcity in several parts of the State as a result of failure of crops and Government, therefore, chalked out programme of relief works with the object of providing employment to the people of the scarcity areas. The Grow More Food Officer, in his recommendation, stated that the work of repairs of Bhandari tank might be taken up at once for giving relief of unemployed labourers of the area under "Relief Works involving hard manual labour". The recommendations of the Grow More Food Officer are contained in the letter dated 17th April 1951 (Ext. K). The Resolution dated 7th April, 1951, of Government of Bihar shows that a large sum of money had been sanctioned by the Government for relief works of various kinds involving hard manual labour [vide Ext. C(I)]. One of such works was minor irrigation works which included construction or repairs of irrigation projects. In pursuance of the above recommendations of the Grow More Food Officer, the State of Bihar, through the Subdivisional Officer of Sitamarhi, undertook the repair works of Bhandari tank. Although the work was of a nature contemplated by the Bihar Private Irrigation Works Act, 1922, it was taken up as a scarcity Relief Measure in order to give immediate relief to unemployed labourers of that locality. From the ordersheet of the Relief Case (Ext. 1) it appears that the estimated cost of the project as sanctioned was Rs. 5000. The work was given to Vivekanand Gir who, describing himself as headman of the Panchayat, executed an agreement (Ext. 2) on 30th April 1951, undertaking to execute the work. The agreement was accepted by the Subdivisional officer who also signed it on the same date and the then Circle Officer, Ram Briksh Shukul, also signed on the agreement on that date. On that very date, Vivekanand Gir, describing himself as mukhia of Manikchouk Gram Panchayat, addressed a letter (Ext. A) to the Circle Officer to get some advance money for the excavation of the tank and it

appears that he was paid Rs. 200 on that date. Order No. 2, dated 30th April 1951, in the Ordersheet (Ext. I) is important. It says that the sanctioned estimated cost of the project is Rs. 5,000 and a sum of Rs. 200 is to be advanced to Vivekanand Gir mukhia of Gram Panchayat. Vivekanand Gir signed against that order and acknowledged receipt of Rs. 200. Besides Rs. 200 paid on 30th April 1951, a sum of Rs. 757 was paid on 11th June 1951 and another sum of Rs. 512 was paid on 4th August 1951. The total amount, thus paid to Vivekanand Gir on account of this excavation work, was Rs. 1469. These are the facts which are admitted or proved beyond controversy.

The questions on which the parties are at variance are these, (I) Whether the work of excavation of Bhandari tank was done under a contract, or whether it was done under a statutory obligation? (II) If the work was done under a contract, whether one of the contracting parties was Vivekanand Gir or the Gram Panchayat of Manikchaulk? (III) If the work was done under a contract, whether the contract was subsisting on the relevant date?

According to the petitioner, the work of excavation of Bhandari tank was done under a contract; whereas, according to respondent No. I, the work was done under the statutory obligation laid upon the Gram Panchayat under the Bihar Panchayat Raj Act, 1947. We shall first deal with the petitioner's case. The terms of the alleged contract can be gathered from two documents, (I) agreement (Ext. 2), and (II) Ordersheet (Ext. I). We can look to both the documents to gather the terms of the alleged contract and this will not be in contravention of the provisions of section 91 of the Indian Evidence Act. Explanation (I), read with Illustration (a), of that section clearly supports this view. It has already been noted above, that Vivekanand Gir also signed against the relevant order in (Ext. 1) and so it cannot be said that he was unaware of the contents of that order.

The agreement (Ext. I) appears to have been drawn up in the form prescribed for the execution of minor irrigation work under the Bihar Private Irrigation Works Act. But this document, considered also with the ordersheet (Ext. I), shows that the work was actually taken up as a Scarcity Relief Measure, and not under the Bihar Private Irrigation Works Act. There is no dispute between the parties on this point. Although the nature of the work and the extent of the work are not specified in the agreement (Ext. 2), the ordersheet (Ext. 1) throws light on these points.

The operative part of the agreement (Ext. 2) is that Vivekanand Gir agrees to execute the work to the full satisfaction of the local officers for a consideration of Rs. 8 per thousand cubic feet of earthwork. From the bills [Exts. (3) and (3a)], it appears that payment was actually made to Vivekanand Gir at the rate of Rs. 12/8/-. No explanation is forthcoming from either party on this increased rate. But the mere fact that payment was made at an increased rate does not alter the position in law of the parties. It cannot be doubted that Ext. 2 is an agreement within the meaning of the Indian Contract Act. The said agreement fulfills all the requirements of section 10 of the Indian Contract Act and is, therefore, a "contract within the meaning of the Act". The essential feature of the agreement (Ext. 2) is that it is for a lawful consideration with a lawful object. There is also a mutuality in this agreement. Vivekanand Gir promised to execute the work and there was a reciprocal promise on the part of the subdivisional Officer to pay Vivekanand Gir for the work executed. The promise of one party was the consideration for the promise of the other party. The question whether Vivekanand Gir made any profit or suffered any loss or did not make any profit and suffer any loss is wholly irrelevant for the purpose of judging the nature of the transaction.

Now, let us investigate if there was any statutory obligation upon the party, who executed the agreement, to do the excavation work. The petitioner has relied upon section 14 of the Bihar Panchayat Raj Act which provides *inter alia*, that the Gram Panchayat shall undertake the control and administration of, and be responsible for, (i) the measures for fighting famine, and (ii) the measures for the protection and improvement of irrigation works in the village. It has been urged that the measures, providing employment to unemployed labourers during the scarcity period, were the measures for fighting famine. It has also been urged that the repairs of Bhandari tank were calculated to protect and improve the irrigation works of the village. The above may be the compulsory duties of the Gram Panchayat, but, in the present case, there is an sufficient proof of the fact that the Gram Panchayat of Manikchaulk was given the work of excavation of the tank and executed the agreement (Ext. 2). The evidence shows that the work was given to Vivekanand Gir who executed the agreement (Ext. 2) in his individual capacity. The expression "headman" or "mukhia", attached to the name

of Vivekanand Gir, is only descriptive and shows the status of the person. Ram-briksh Shukul (P.W. 1), the then Circle Officer, who also signed on the agreement (Ext. 2), clearly says in his evidence that the work was given to Vivekanand Gir in his individual capacity. His evidence shows that such works used to be entrusted to a responsible person of the village. It is noteworthy that Vivekanand Gir, who was all along present at the trial, did not come to the witness box to say on oath that the Gram Panchayat was given the work and he executed the agreement (Ext. 2) on behalf of the Panchayat. We, therefore, hold that the work given to Vivekanand Gir who executed the agreement (Ext. 2) in his individual capacity. It has not been shown that there was any statutory obligation on the individual, namely, Vivekanand Gir, to whom the work was entrusted and who executed the agreement (Ext. 2).

There are certain terms in the agreement itself which unmistakably point to the conclusion that Vivekanand Gir was required to do the excavation work under a contract, and it was not the Gram Panchayat which was directed to do the work under any statutory obligation. Paragraph 5 of the agreement says that Vivekanand Gir shall get advance of money for carrying on the project and he and his heirs and assignees shall be liable for proper accounting of the money advanced and the amount unaccounted for shall be realised from him and his heirs and assignee either personally or from their moveable or immovable property. Paragraph 7 recites that in case of Vivekanand Gir's leaving the work incomplete, he and his heirs and assignees shall be liable to pay damages. These terms indicate that the transaction was in the nature of a contract and did not represent the statutory obligation of the Gram Panchayat. If the transaction represented any statutory obligation, there would have been no necessity to take any agreement. In that case, the question of Vivekanand Gir's or the Gram Panchayat's agreeing or not agreeing to execute the work would have been immaterial and one would expect that the Subdivisional Officer should have, instead of taking the agreement, issued an order directing Vivekanand Gir or the Gram Panchayat to execute the work.

The contesting respondent relies upon certain documents, namely, Proceedings Book, Accounts Books, and Diary of Gram Sewak of Manikchawk Gram Panchayat, for the purpose of showing that the excavation of Bhandari tank was executed by the Gram Panchayat. The most important document is Cash Register of Gram Panchayat (Ext. E). This register was written by the Gram Sewak, Binda Prasad (P.W. 4). In the accounts for the months of May, June, July and August, 1951, there are certain entries relating to excavation of Bhandari tank. These entries appear on pages 20, 21, 22, 23, 26 and 27 of the register. It has been contended on behalf of the petitioner that the above entries are interpolations made at the instance of Vivekanand Gir. Binda Prasad (P.W. 4) has deposed that on 20th February, 1952, he was sent for by Vivekanand Gir, that he went to him at the *Math*, that he was asked by Vivekanand Gir to take out some pages from the Cash Register and to substitute new pages showing amounts advanced by Government in respect of Bhandari tank, that, at first, he showed unwillingness to do this job, but ultimately, did it, as he was threatened with assault. The witness has deposed that the leaves (marked X to X 4 for identification) in blank forms were substituted and accounts were re-written after entering advances and disbursements in respect of Bhandari tank. The witness has further said that he informed Dasrath Jha and Raja Ram Thakur of the occurrence on the same day and that on 22nd February, 1952 he reported the occurrence in writing to the District Magistrate. The statements of Binda Prasad are corroborated by the evidence of Raja Ram Thakur (P.W. 2) and Dasrath Jha (P.W. 3) and by the written report to the District Magistrate (Ext. 8). The District Magistrate directed Mr. L. N. Panday, a Deputy-Magistrate, to make an enquiry and report (*vide* Ext. 8(a)). Mr. L. N. Panday (P.W. 5) made enquiry and submitted a report (Ext. 9). The report is to the effect that the allegations in the Gram Sewak's petition are true. It is noteworthy that Mr. L. N. Panday who was examined as witness on behalf of the petitioner and who proved his report (Ext. 9), was not cross-examined by the respondent regarding the merits of his report, nor was Vivekanand Gir, who was all along present at the trial, put in the witness box to deny the serious allegations made against him. We, therefore, see no reason to disbelieve the evidence of Binda Prasad on this point. There is also intrinsic evidence in the register itself indicating that the leaves (marked X to X 4 for identification) were subsequently inserted in the register. The above leaves bear page marks 19 to 28 and page marks 173 to 182 have been given on the leaves on the other side of those sheets of paper. The page marks 19 to 28 and 173 to 182 appear to be in clearly different ink from the remaining page marks in the register. Again, page mark "173" was written after striking off the page mark "29" (*vide* Ext. 7). The writer (P.W. 4) has stated in his evidence that he first

put mark "29" on the page to the right side of page "28", but at the intervention of Vivekanand Gir he changed "29" into "173" so that the page mark might agree with the other page marks of the register. This fact is clearly demonstrated by inspection of the register itself. There is, thus, no doubt in our mind that the leaves bearing page marks 19 to 28 and 173 to 182 were, subsequently, inserted, and that the register (Ext. E) is a tampered document. No reliance can therefore, be placed upon Ext. E.

Ext. L is the minutes of the proceedings of the meeting of the Gram Panchayat held on 29th April, 1951. It was decided in that meeting that the Mukhia should get money from Government for excavation of Bhandari tank and that a sub-committee consisting of 3 members, namely, Chandra Shekhar Jha, Bengali Singh and Rudal Rai, should be formed for keeping the funds, maintaining accounts and supervising the works relating to Bhandari tank.

Ext. H is Account Book showing income and expenditure on Bhandari Pokhar Relief Works for the period from 1st May, 1951 to 6th August 1951.

Ext. I is Attendance Register of labourers employed on Bhandari Pokhar Relief Works from 22nd May, 1951 to 30th June, 1951.

Ext. J is Distribution of Wages Register relating to Bhandari Pokhar Relief Works for the period from 22nd May, 1951 to 30th June, 1951.

The documents, Exts. L, H, I and J, will only show that a Sub-Committee of Manikchauh Gram Panchayat was put in charge of the excavation of Bhandari tank. Even assuming that Vivekanand Gir, who was mukhia of the Panchayat, formed a Sub-Committee of 3 members and put those members incharge of the execution of Bhandari tank, this fact will not, in our opinion, alter in law the position of Vivekanand Gir, as established by the contract which has already been discussed above. The contract was not with the Gram Panchayat, or the Sub-Committee of the Panchayat, and if Vivekanand Gir, with whom the contract was made, got the work executed by some other agency, he was still bound by the terms of the agreement (Ext. 2), and he could not be exonerated from any liability accruing under that agreement.

Ext. D is the Diary of the Gram Sewak, Binda Prasad (P.W. 4), attached to Manikchauh Gram Panchayat. The entries of the dates, 22nd May, 1951, 23rd May, 1951, 4th June, 1951 and 14th June, 1951, in the Diary indicate that the Gram Sewak did some work in connection with excavation of Bhandari tank. Binda Prasad has admitted in his evidence that he did such work whenever he was directed by Vivekanand Gir to do so. It is not strange that the Gram Sewak occasionally supervised the excavation of the tank at the bidding of Vivekanand Gir, who was the mukhia of the Panchayat. But from this, it cannot be inferred that the work was really contracted to be done by the Panchayat.

Upon examination of the entire evidence on the record, we come to the conclusion that the excavation of Bhandari tank was done under a contract, to which Vivekanand Gir was a party in his individual capacity.

The last question for consideration is, whether the contract was subsisting on the relevant date. From the ordersheet (Ext. I), it will appear that Vivekanand Gir was required to complete the work before the rainy season of the year 1951. This direction was given consistent with the rules governing Scarcity Relief Measures. The Bihar and Orissa Famine Code, 1930, which also governs Scarcity Measures, provides in section 196 that, unless the Local Government orders otherwise, all relief works should be closed as soon as the earliest principal autumn crop is ripe. Further, the nature of the project itself demanded that this work should be completed before the rainy season, for when water accumulated in the tank, excavation could not be usefully carried out. Although the extent of the work to be done was not clearly specified in Exts. 1 and 2, it was apparent that the work to the value of Rs. 5,000 could be executed under the agreement.

Now, let us examine the evidence adduced by the parties on this point.

Rambriksh Shukul (P.W. 1), who was the Circle Officer when the work of excavation commenced, is unable to say if any work was done after the rains, as he made over charge of that Thana about the middle of May, 1951, when the work was in progress.

Raja Ram Thakur (P.W. 2) has stated in his evidence that the work commenced before the beginning of rains and was stopped during the rains. The work was again taken up after the rains and it was done for 8 or 10 days in the month of Katik. After that, the work was stopped and was not taken up again.

Dasarath Jha (P.W. 3) has also deposed to the same effect. His evidence shows that the work was taken up for a short time after the rains in the month of November, 1951.

Binda Prasad (P.W. 4) has also deposed that after the rains the work was done for 15 or 20 days in the month of November and after that no work was done. In his cross-examination, he has stated that he did not supervise the work of excavation of Bhandari tank after the rains, as he was not asked to do so. There is no entry in his Diary (Ext. D) showing supervision of such work after the rainy season.

Suraj Deo Singh (P.W. 6), who took over charge as Circle Officer from Ram Briksh Shukul (P.W. 1) and who was in charge of relief works in Thana Runlsaidpur till about the middle of November, 1952, has stated in his evidence that he often supervised the excavation of Bhandari tank and got measurements made in the month of July, 1951. It appears that Vivekanand Gir addressed a letter (Ext. G) to Surajdeo Singh on 4th July, 1951 on this subject. The relevant portion of the letter runs as follows:—"Send your work Inspector to get the final measurement of the tank as the weather looks bad". Surajdeo Singh sent a reply (Ext. F) on the same day saying "I have already sent my Work Inspector to take measurement". The term "final measurement" in Ext. (G) indicates that no work was to be done after the above letter was despatched. It appears that this letter was sent in accordance with one of the terms stated in paragraph 6 of the agreement (Ext. 2). The above paragraph requires the contractor to notify to the local officer the date of completion of the work immediately when it is done so that the officer might inspect the work and take final measurement. After the final measurement, the last payment of Rs. 512 was made to the Contractor on 4th August 1951 in pursuance of the order dated 3rd August 1951, recorded in the ordersheet (Ext. 1). This is the last order in the ordersheet of the Relief Case. The payment of Rs. 512 was made on the basis of the bill [Ext. 3(a)]. Although the heading of this Bill is "Running Account Bill" and although in the order dated 3rd August 1951 the word "Interim bill" has been used, it is evident that the final measurement having been made, the bill (Ext. 3-A) was the final bill, and not an interim bill. Surajdeo Singh has, however, said in his evidence that at the time of measurement in July, 1951, Vivekanand Gir told him that he would complete the work of excavation after the rains. From his cross-examination it appears that there was no communication between him and Vivekanand Gir after 3rd August, 1951, and that he took no steps to have the work completed. We are not prepared to believe the statement of Surajdeo Singh that Vivekanand Gir told him that he would complete the work after the rains. It seems to us clear that when the final measurement was made, no work remained to be done. Although work to the value of Rs. 1,469 only was done and the entire amount sanctioned, namely, Rs. 5,000, was not spent up, it appears that the work of excavation was either completed or abandoned in July 1951.

Let us, now, deal with the oral evidence adduced by the respondent.

Methur Sahu (R.W. 1), who has his shop at a short distance from Bhandari tank, has deposed that no excavation was done after the rains and that the water of the tank has not dried up after the excavation.

Bujhaun Pathak (R.W. 2), Budhan Mehto (R.W. 3), Lachhman Jha (R.W. 4), Jla Manjhi (R.W. 5), Billat Thakur (R.W. 6), Akshay Lal Thakur (R.W. 7), Kameshwar Jha (R.W. 10) and Chander Shekhar Jha (R.W. 11), have also deposed to the same effect. It may be noted that R.W. 3 and R.W. 5 are labourers who had worked at the excavation of Bhandari tank. The evidence of R.W. 10, who is Karamchhari of village Manikchauk, is very important. He has said in his evidence "The work was commenced in May, 1951, and was ended in June, 1951. The entire tank was dug out and work was completed. Final measurement was done in the first week of July, 1951. The tank has not dried up after that digging. No work was done in connection with this tank after the final measurement.

There is, thus, ample evidence on the record to warrant the conclusion that the work was either completed or abandoned in July, 1951, and we find accordingly. The evidence of P.W. 2, P.W. 3, and P.W. 4 that the work was resumed for some days after the rainy season is not worthy of reliance.

From the findings that the excavation work of Bhandari tank was either completed or abandoned in July, 1951 and all payments to the contractor made by the beginning of August, 1951, it follows that there was no subsisting contract on the date when the nomination paper of respondent No. 1 was presented to the Returning Officer or on the date when his nomination was accepted by the Returning Officer. We, therefore, find that respondent No. 1 was not disqualified for being chosen as a member of the Bihar Legislative Assembly. This issue is, accordingly, answered in favour of respondent No. 1.

Issue No. 4.—In view of our finding on Issue No. 3, we hold that the nomination of respondent No. 1 was not improperly accepted. The latter part of this issue does not, therefore, arise.

Issue No. 5.—This issue has not been pressed. The facts covered by this issue have no bearing on the question whether the election in the constituency is wholly void or whether the election of respondent No. 1 is void.

Issue Nos. 6, 7, 8 and 9.—In view of our finding that the election petition is not maintainable for non-compliance with the requirement of section 82 of the Representation of the People Act, 1951, and also according to our findings that respondent No. 1 was not disqualified to stand for election and his nomination was not improperly accepted. We hold that the election in the constituency in question is not wholly void, that the election of respondent No. 1 is not void, and that the petitioner is not entitled to get any relief.

In our judgment, therefore, the election petition fails and should be dismissed.

In the circumstances of the case, we are not inclined to award any cost to respondent No. 1.

HIGH COURT OF PATNA;

The 27th July, 1953.

(Sd.) BASU PRASAD, *Chairman.*

(Sd.) HARGOBIND PRASAD SINHA, *Member.*

Typed at my dictation and revised and corrected by me.

(Sd.) BASU PRASAD, *Chairman.*

The facts of the case have already been stated in the judgment of the Chairman and it is not necessary to state them again in my judgment. I, however, propose to give separately my findings on issues Nos. 3 and 4 and also on the question relating to the provisions of section 82 of the Representation of the People Act, 1951.

FINDINGS

Issue Nos. 3 and 4.—The case of the petitioner is that respondent No. 1 was disqualified for being chosen as, and for being a member of the Bihar Legislative Assembly under section 7(d) of the Representation of People Act, 1951, inasmuch as at the relevant time the said respondent No. 1 was a party interested in a contract for the execution of a work *viz.*, the excavation of Bhandari tank in village Manjchhauk undertaken by the State Government under agreement entered into by him in this behalf on the 30th April, 1951 with the Circle Officer Minor Irrigation Department serving under the State Government. The defence of Respondent No. 1 with regard to this point is that he had not been at the relevant time interested in contract for the execution of a work undertaken by State Government; that the alleged excavation work was done under the Famine Relief Code and Rules and Regulations governing famine relief work by the Gram Panchayat which under the Gram Panchayat Act and under the rules made thereunder, the said Panchayat was bound to do without consideration of remuneration or profit, as an elected Mukhia of the said Gram Panchayat; the respondent No. 1 had to represent the said Gram Panchayat in all matters and all agreements with the Gram Panchayat had to be executed with this respondent as Mukhia in any case the work of excavation of Bhandari tank had been stopped before the date of filing of the nomination papers; no work was subsisting under agreement on the relevant date the entire work having been completed and further work being stopped, final payment was made in early August, 1951 on which date the said agreement and work terminated.

Therefore, under this issue I have to decide the following:—

- (I) Whether there was a contract between respondent No. 1 and the State Government.
- (II) Whether the contract was in his individual capacity or as Mukhia of Gram Panchayat.
- (III) If there was a contract, whether it was subsisting on the relevant date.

The agreement is Ext. 2. It is dated 30th April, 1951. It is on typed form used for the purposes of Bihar Private Irrigation Works Act, 1922.

From scrutiny of the terms of the agreement it appears that the typed form of agreement was intended to be used for Private Irrigation Works as is evident from most of the paragraphs of the agreement. The agreement has been executed by Vivekanand Gir Chela of Mahanth Vijaynand Giri of village Manjchhauk, as

headman of the Panchayat. In the beginning it is stated "do hereby undertake the construction, alteration, extension and maintenance of the Minor Irrigation Works project sanctioned as per petition No. for which I have noted down the specified other details for this minor irrigation work". But no specification or details have been mentioned in the agreement. In the 8th paragraph after deleting what was typed, it has been added "I do hereby undertake to execute to the full satisfaction of local officers at Rs. 8 per thousand cubic feet of earth work". The nature, extent and particulars of the work are not mentioned nor is there any mention of the sanctioned estimated cost in the body of the agreement. In paragraph 5 of the agreement, the respondent No. 1, no doubt, makes himself, his heir and assignees liable for accounting any payment of the dues to the Collector. It is significant to note that the two bills Ext. 3 and Ext. 3(a) mention the rate Rs. 12/8/- cubic feet according to which the payment was made which is entirely different from the rate given in the agreement. Therefore, the agreement was not acted upon. This is quite clear that the agreement does not mention the nature and extent of the work for which the agreement was entered into. In the body of the agreement the paragraphs speak of the minor irrigation work and the responsibilities also are under the same. Under section 91 of the Evidence Act, when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract. I, therefore, hold that the agreement is uncertain and not enforceable by law.

It has been stated above that the excavation was started as a Private Irrigation Work, but ultimately converted into a relief work under the Famine Code. It appears from Ext. C(1), Resolution No. 2703-R, Government of Bihar, Revenue Department, dated 7th April, 1950 and Ext. C(2), letter, dated 14th November, 1950 addressed by the Additional Secretary to Government to all District Officers that Government apprehended scarcity in several parts of the State of Bihar in 1951-52 as a result of failure of crops. The Resolution Ext. C(1) gives the programme of relief works for 1951-52, allotment of funds for the purposes and instructions for their utilisations. The programme of relief work was sanctioned with a view to ensure the maximum amount of relief being made available to the people in all areas in which distress may occur. Under this programme, priority was to be given to the sanctioned projects of all departments of Government in the distressed areas. The advantage in giving top priority to the execution of the sanctioned projects of all departments was that the work could be started without any delay. It was also laid down that other items of work should be taken up, after being arranged according to prior keeping in view the volume of un-employment, or scarcity apprehended in any particular area provided they were found to be necessary in addition to the execution of the sanctioned projects of the various departments. It is also mentioned in that resolution that Government desired that both in arranging priority as well as in making arrangements for the execution of the projects, full use should be made of the services of the non-official members of the Advisory Committees as well as Gram Panchayats, Co-operative Societies and such other non-official organisations as may be functioning in villages in which distress prevails. It was also provided that the sanctioned projects of other departments should be pushed through immediately without waiting for the programme or other item of new work being drawn up. Such sanctioned projects of other departments included among many other schemes, irrigation projects of Irrigation Department, minor irrigation project of the Revenue Department etc. Provision of funds had been made separately for the sanctioned projects, other than new item of works to be taken up specifically for relief purposes.

It is quite clear from the above summary of the Resolution Ext. C(1), that in pursuance of this resolution Ext. C(1), the Private Irrigation Scheme of Bhandari tank of village Manikchawk was converted into a relief work under the Famine Code.

Ext. C is Memorandum No. 1336, dated 23rd April, 1951, from Directorate of Gram Panchayats, Bihar, to all District Panchayats officers. By this memorandum the attention of the District Panchayats officers have been particularly invited to paragraph 2 of Ext. C(1) in which the District Officers have been requested to utilise the services of the Gram Panchayats in the execution of the Relief Operations. The District Panchayat Officers are requested to organise non-official Panchayats in villages which are situated in distressed areas so that proper arrangements for relief operation should be made. Paragraph 1 of this memorandum gives the details of the relief work in which Gram Panchayat can render considerable assistance. It is also evident from the designation of the officers such as Charge Superintendent, Circle Officer etc. under whose supervision the execution of Bhandari tank was conducted that the work was done under the officers known to Famine Code.

The Bihar Panchayat Raj Act, 1947, section 14 mentions the compulsory duties of the Gram Panchayat. Under this section the Gram Panchayat shall undertake the control and administration of, and be responsible for, amongst many other items (i) extinguishing and fighting fires, famine, burglary and dacoity (k) the execution of such measures in regard to rural development schemes as the Government may direct, and (l) the protection and improvement of irrigation works in the village.

From what has been stated above I am inclined to hold that the excavation of Bhandari tank was mere in the nature of a Statutory obligation than a contractual obligation. A statutory obligation does not cease to be so if an uncertain and unenforceable agreement is super-imposed on it.

It is to be decided now if the agreement was entered into by respondent No. 1 in his individual capacity or as Mukhia of Manikchawk Gram Panchayat. Let me examine the documentary evidence on this point. The letter Ext. A, dated 30th April, 1951, asking for advance for the excavation is on behalf of Vivekanand Gir Mukhia Gram Panchayat Manikchawk. This letter indicates that the excavation of the Bhandari tank was under relief scheme and not under Private Irrigation Work Act. Mr. Sukla's note on this letter also speaks of it as relief scheme. We have already noticed that the agreement Ext. 2, dated 30th April, 1951 shows that the agreement was executed as Mukhia Gram Panchayat. The ordersheet Ext. 1 also records that Rupees two hundred should be advanced to Vivekanand Gir Mukhia Manikchawk Gram Panchayat. The Ext. G application of the mukhia for final measurement is signed by Vivekanand Gir and the seal of the Mukhia Gram Panchayat is attached to it. Ext. L is the resolution dated 29th April, 1951 of Manikchawk Gram Panchayat stating that the mukhia may be authorised to bring money from the proper authority to excavate the tank in order to provide relief to the unemployed and constituting a sub-committee for keeping the money and its accounts, as the mukhia had little time at his disposal. Ext. H, the Account Book, Ext. I, the Attendance Register, Ext. J, the Distribution of Wages Register of Bhandari Pokhar Relief Work Sub-Committee, Manikchawk, Gram Panchayat were maintained by the Sub-Committee. The entire Account Book of the Manikchawk Gram Panchayat has also been produced which is marked E. The total income and expenses of the relief work have been incorporated in this Account Book on pages marked Exts. E to E-4. All these entries support the case of the respondent No. 1 that the agreement was executed on behalf of the mukhia representing the Gram Panchayat and not in his individual capacity. At this stage it would be relevant to notice the case of the petitioner to the effect that the pages marked Exts. 21 to E-4 in the Account Book and resolution of the Gram Panchayat Ext. L have been interpolated for the purpose of this election case. This case of interpolation of the pages is a double edged weapon which may cut both ways in-as-much as it may be at the instance of the respondent No. 1 who was the mukhia or of the petitioner who is the Chairman District Board, Muzaffarpur and whose man Binda Prasad, P.W. 4 was working as Gram Sewak in Manikchawk Gram Panchayat. P.W. 4 Binda Prasad has been examined to establish this case of interpolation. His evidence is that the mukhia on 20th February, 1952 asked him to take some pages and substitute new pages and show the accounts advanced by Government in respect of Bhandari tank in these pages and he was compelled to do so at the threat of the mukhia. It is important to notice that the result of the election was declared on 30th January, 1952. The complaint by Binda Prasad was made to the Collector Muzaffarpur on 22nd February, 1952. It is curious that Binda Prasad did not bring this important fact to the notice of any of the 15 members of the administration side of the Panchayat. He spoke of this incident to Raja Ram, a member on the Judicial side, Dasrath Jha, assistant teacher Board School under the District Board, Muzaffarpur and Chhedi Lal at Muzaffarpur who was the uncle of Binda Prasad. Except filing a petition before the collector Binda Prasad had taken no other steps in this matter. No action had been taken against Binda Prasad for his part in occurrence related above. It appears from the evidence on the record that nothing was done in the matter of the petition of complaint to the Collector after enquiry had been made by a Magistrate Shri Lakshmi Narayan Panday to whom the petition was referred for enquiry and report. The Magistrate is P.W. 5 who says in cross-examination that it was a general enquiry and not under Cr. P. Code. From the circumstances stated above, I hold that the complaint was meant to be used for the purposes of the Election Petition. According to Binda Prasad the Account Book of the Gram Panchayat was not available in the office of the Panchayat from 28th November, 1951 to 13th February, 1952. But we find in the register the accounts of December 1951 as also of January, 1952. I have already stated that oral evidence has been adduced to prove that there are interpolations made in this register. I attach very little value to the evidence of Binda Prasad who is the author of this interpolation and who is said to be a man of the camp of the petitioner. The petitioner has attempted to show that there is intrinsic evidence in the register itself to show

that the interpolations have been made. Even if the interpolations are established, the real point remains to be decided as to who is responsible for these interpolations made through Bindra Prasad. But we have to remember that the question of interpolation in the registers is relevant only with regard to the point whether the agreement was entered into in individual capacity or as Mukhia representing the Gram Panchayat. Even assuming that there was a valid contract and the contract was entered into by the respondent No. 1 in his individual capacity, the real point still remains to be decided whether the contract was subsisting at the relevant date. Therefore, it is not essential for the determination of this case to give my finding on the question of the interpolation of the registers.

The evidence of Bindra Prasad P.W. 4 that respondent No. 1 was doing the work in his individual capacity does not find support from his official diary Ext. D. The entries in this official diary, for example the entries dated 22nd May, 1951, 23rd May, 1951, 4th June, 1951; 5th June, 1951 and 14th June, 1951 point out clearly that the excavation work of Bhandari tank was being executed by the mukhia on behalf of the Gram Panchayat.

All these circumstances indicate that the excavation was taken up by the mukhia Gram Panchayat as representing the Panchayat and not in his individual capacity.

Now I shall take up the most important factor, that is to say, whether the contract was subsisting at the relevant date. I agree with the reasonings and findings of the chairman that the contract, if any, was put an end to and the scheme was abandoned and, therefore, the contract was not subsisting after 3rd August, 1951.

In Election Petition No. 177 of 1952 *Shri Pramatta Singh versus Shri Deo Saran Singh* and others reported in Gazette of India, dated 18th April, 1953, I have traced in detail the genesis of the disqualifications mentioned under section 7(d) of the Representation of the People Act, 1951. It is sufficient to say in this case that the disqualification applies to executory contract only and not to contract completely executed before the election. There can be no doubt where the work has been executed and payment has been made for the work, nothing remains to be done by either party and contract is at an end.

For all these reasons, I hold that at the date of the filing of the nomination paper, respondent No. 1 was not disqualified under Section 7(d) of the Representation of the People Act, 1951. Consequently, the nomination of Respondent No. 1 was not improperly accepted.

Issue No. 1.—Three objections have been raised challenging the maintainability of the election petition, namely:—

- (1) The election petition is liable to be dismissed as Shri Pradip, a duly nominated candidate has not been joined as a respondent and thus the mandatory provision of section 82 of the Act has been contravened.
- (2) The election petition though verified has not been signed as required by section 83 of the Act.
- (3) Two reliefs have been sought contrary to the provisions of section 84 of the Act.

With respect to objections Nos. 2 and 3 I agree with the reasonings and findings of the chairman and hold that the objections are without merit and untenable.

The first objection requires a very careful consideration. Shri Pradip one of the duly nominated candidates has not been made party respondent to this Election Petition. Therefore, according to the respondent the non-joinder of Shri Pradip is fatal by reason of the neglect of the statutory requisites of section 82 of the Representation of the People Act, 1951. Section 82 of the Act runs as follows:—“*Parties to the petition.*—A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated”. It is quite clear that the Act neither in this section nor in any other section provides for the consequences of non-compliance of the provisions of section 82. When a Statute requires that something shall be done without expressly declaring what shall be the consequences of non-compliance the question arises what intention is to be attributed by inference to the Legislature. This intention is difficult to gather. No rule can be laid down for determining whether the command is to be considered as a mere direction involving no invalidating consequence in its disregard, or as imperative with an implied nullification for disobedience. The fundamental rule is that it

depends on the scope and object of the enactment. The whole scope and purpose of the statute should be taken into consideration. It is from the context along with other circumstances that the nature of the provision is to be ascertained and more use of the words, such as 'shall' is not conducive in this respect. The dictionary or the grammatical meaning of the words is not a safe guide.

Moreover, in interpreting statutes a distinction is to be drawn between affirmative and negative terms. Crawford Statutory construction at page 519 in section 262 deals with mandatory and directory or permissive words. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory although they are often used interchangeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. If the language of the statute considered as a whole and with due regard to its nature and object reveals that the legislature intended the words 'shall' and 'must' to be directory they should be given that meaning. The same author at page 523 in section 263 deals with affirmative, negative, prohibitory and exclusive words. Negative, prohibitory and exclusive words or terms are indicative of the legislative intent that the statute is to be mandatory. And this is so even though the statute provides no penalty for disobedience.... Where affirmative words are used if a negative is neither expressed or implied the statute is merely directory.... A statute which requires certain things to be done, but does not prescribe any results to follow if they are not done should be held as directory. In the Full Bench Case *Ramesher Versus Sheodin*, 12 Allahabad 510, Justice Mahmood makes the following significant observation at page 521. "The recognised rules of interpreting statutes draws a distinction between affirmative terms, however mandatory, whether such mandate is conveyed by the word 'may' or by the word 'shall' and negative terms prohibiting any particular thing to be done." As I understand the rules of interpretation I hold that a vast distinction exists between these two clauses of enacting clauses in statutes and that whilst in cases of affirmative words even the word 'shall' might be taken to be only directory as distinguished from imperative; in cases of negative words the rule of interpretation is to take them as prohibitory and as such rendering illegal that what is done in contravention of prohibition. The same proposition is stated in *Pandurang versus Ramchandra*, 1930, Bombay 554 at 560. It has been decided in that case that the use of the word 'shall' would not by itself make a provision mandatory. It is to be construed with reference to the context in which it is used.

With this background relating to the rules of interpretation, I have to examine the context in which Section 82 has been enacted and the scope and purpose of the Act. I find that in Part VI, under which this section 82 finds a place, there are sections to indicate that the legislature has definitely provided for the consequences for non-compliance of some of the provisions of this Act. Section 85 provides as follows. "If the provisions of section 81, 83 or section 117 are not complied with, the Election Commission shall dismiss the petition." Again in Section 90(4) the Tribunal has been given the same power:—"Notwithstanding anything contained in section 85, the Tribunal may dismiss an Election petition which does not comply with the provisions of section 81. Section 83 of section 117". I find, therefore, that Chapter II of Part VI which deals with the presentation of Election Petition to Election Commission makes a clear distinction between mandatory and directory provisions. The provisions of sections 81, 83 and 117 are mandatory as the consequences of non-compliance of those sections are distinctly given and it can be safely gathered from this context alone that section 82 is not mandatory but merely directory or recommendatory. It has been contended that the Election Commission cannot ascertain from the Election petition as to who are the duly nominated candidates at the Election and hence section 82 has not been included in section 85. Whatever may be the reason for this non-inclusion, it lends support to the conclusion that section 82 is not mandatory. Moreover, it is not difficult for the Election Commission to enquire as to who are the duly nominated candidates. It has been argued that the consequences of non-compliance of section 82 are left to be determined under Chapter III when the trial of Election Petition commences with the appointment of the Election Tribunal. But section 90(4) presents another difficulty. Now that the trial has commenced and the Election Tribunal has been posted with the facts of the case, it should have been empowered to dismiss *in limine* the Election Petition for the non-compliance of section 82. But this has not been done and we can legitimately infer that the legislature has refrained purposely from providing with the consequences of non-compliance of section 82 and so section 82 remains merely recommendatory.

Let me examine the other provisions of the Act to find out if the consequences of non-compliance have been mentioned in the Act. In section 33(3) the consequences of non-compliance of the section are given. The relevant portion is that

no candidate shall be deemed to be duly nominated unless such declaration is or all such declarations are delivered along with the nomination paper. Section 33(3), provisos 2 and 3 also refer to the consequences for the non-compliance of the provision. Section 34 also which speaks of deposit mentions the consequences of non-compliance. A careful examination of these instances in the body of the Act makes it clear that whenever the legislature has intended the provision to be mandatory it has mentioned the consequences of non-compliance either in that very section or in a different section.

Moreover, if non-compliance of section 82 is fatal and if there is no election petition in the eye of law due to the non-joinder of a duly nominated candidate, there should be no appointment of the Election Tribunal for the trial of such a petition. Section 86(I) provides "If the petition is not dismissed under section 85, the Election Commission shall appoint an Election Tribunal for the trial of the petition." A perusal of section 90 makes it clear that a petition which does not comply with section 82 is still an election petition under section 90(I), which provides "the tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be published in the Official Gazette, and at any time within 14 days after such publication, any other candidate shall subject to the provisions of section 119 be entitled to be joined as a respondent." Section 119 provides, "No person shall be entitled to be joined as a respondent under sub-section I of section 90 unless he has given such security for costs as the Tribunal may direct."

Section 90(I) offers another explanation for holding that section 82 is not mandatory. A careful scrutiny of this section abundantly shows that a duly nominated candidate is entitled to be joined at a respondent under this section also. It has been contended by the respondent that any other candidate in section 90(I) does not include a duly nominated candidate but it means only a candidate who claims to be duly nominated. In other words I am called upon to give an unreasonable and not a plain interpretation to the term "any other candidate" in section 90(I). The term "candidate" has been defined in section 79(b) which runs as follows:—"candidate means a person who has been or claims to have been duly nominated as a candidate at any election". If this definition is substituted for candidate in the term any other candidate in section 90(I) the conclusion is irresistible that any other candidate means also a duly nominated candidate and not only a candidate who claims to be duly nominated. It is not possible to give a strained interpretation to the term any other candidate for merely making it consistent with the interpretation that section 82 is mandatory. Section 90(I) in my opinion supplies a very clear ground for holding that section 82 is directory. I therefore, hold that even if the provisions of section 82 are not complied with and one of the duly nominated candidates is not made a party, this defect can be cured under section 90(I). The other argument of the respondent is that the petitioner by not joining a duly nominated candidate as respondent penalises him in the sense that if the respondent wants to join the petition under section 90(I) he has to deposit a security under section 119. Whatever may be the reason for demanding security from a duly nominated candidate who wants to join the election petition under section 90(I) it is quite clear that the defect of non-compliance of section 82 is curable by Section 90(I).

The provision of section 82 is not mandatory for another reason also. The Act and the rules framed thereunder do not define the term "duly nominated candidate". The following are the definitions of a candidate for election at different stages in the Act:—

- (i) *Candidate (generic sense)*.—Any person may be nominated a candidate for election to fill a seat in any constituency if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act (Section 32).
- (ii) *Deemed to be duly nominated candidate*.—No candidate shall be deemed to be duly nominated unless such declaration is or all such declarations are, delivered along with the nomination paper [Section 33(3), Section 34].
- (iii) *Candidate (technical sense)*.—"candidate" means a person who has been or claims to have been duly nominated as a candidate at any election [section 79(b)].
- (iv) *Returned candidate*.—means a candidate whose name has been published under section 67 as duly elected.
- (v) *"A validly nominated candidate"*.— Means a candidate who has been duly nominated and has not withdrawn his candidature in the manner and within the time specified in sub-section (I) of section 37 or in

that sub-section read with Sub-section (4) of section 39, as the case may be [Rule 2(f), Representation of the People (Conduct of elections and election petitions) Rules, 1951].

The term duly nominated has been used in the definition of validly nominated candidate stated above but the fact remains that duly nominated candidate has not been defined in the Act. It is a question of some difficulty to ascertain as to who is the duly nominated candidate. Section 33 and 34 read together may indicate that a nominated candidate who has complied with the requirements of these sections will be deemed to be duly nominated candidate but when he becomes a duly nominated candidate is not clear from any section. If this process of reasoning is continued then it can be said that after the returning officer has exercised his right of scrutiny under section 36, the duly nominated candidate comes into existence. The returning officer under section 36(6) can either accept or reject the nomination papers. So it may be inferred that a candidate whose nomination paper has been accepted by the returning officer is the duly nominated candidate but it is doubtful whether the candidate whose nomination paper has been rejected also comes under the category of duly nominated candidates. There is a clear lacuna in the Act, therefore, in not defining duly nominated candidate. There is a time fixed for withdrawal of candidature under section 37. The definition of a validly nominated candidate also throws some light on the term duly nominated candidate. In this case it is not necessary to decide as to who is a duly nominated candidate. I have discussed the difficulties of ascertaining the real meaning of the term duly nominated candidate only to show that legislature in its wisdom can never make the nonjoinder of a duly nominated candidate, who is not defined in the Act, fatal to the maintainability of an election petition.

It has been argued that section 80 of the Act is mandatory which runs as follows:—"No election shall be called in question except by an election petition presented in accordance with the provisions of this Act." In my view Section 80 is referable to section 81 of the Act which deals with the presentation of petitions and if the provisions of section 81 have been complied with the petitioner has fulfilled the mandatory provisions of section 80. Section 82 deals with parties to the petition and not with the presentation of the petition. Moreover, section 80 may be divided into two portions. (i) No election shall be called in question except by an election petition (ii) petition is to be presented in accordance with the provisions of this Part. The first portion is prohibitory and so far it is mandatory. The second portion is affirmative and it is therefore, directory. Statutes may be imperative as to part and directory as to part. *Stubbins, Ex. Parte* (1917) 1, Kings Bench 1 at 15. The first portion deals with the substantive right and the second portion deals with the procedure for enforcing and establishing the substantive right. "The judiciary has been very generous in the treatment of Statutes relating to procedure".... "An interpretation of a procedural statute which insures that a case will be considered on its merits so that substantive rights will be presented is to be highly preferred". Sutherland Statutory Construction Vol. III, third edition.

There is yet another reason to show that the section is not mandatory. It is for the court to decide whether the party is a proper party or a necessary party. A person may be added as a defendant to a suit, though no relief may be claimed against him provided his presence is necessary for a complete and final decision of the question involved in the suit. Such a person is called a proper party as distinguished from a necessary party. Necessary parties mean parties necessary to the constitution of a suit, i.e. persons whose joinder is necessary to enable the court to award such relief as may be given in the suit as framed. In Civil Procedure Code as regards non-joinder of parties, a distinction has been drawn between the non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. In section 82 the term duly nominated candidate may include proper parties as well as necessary parties, for example a successful candidate who has been returned and against whose election, an election petition has been filed is a necessary party and in his absence the election petition is not maintainable but this will not apply to the case of all duly nominated candidates. It may be said that all validly nominated candidates are necessary parties. The circle of duly nominated candidates is larger than that of the validly nominated candidates. The former is the genus and the latter the species. Shri Pradip having been duly nominated had withdrawn his candidature. He is therefore, a candidate who is not interested in the result of the election or election petition. His presence, therefore, is not necessary to enable the Tribunal to give relief to the petitioner. He is, therefore, not a person without whose presence the questions in the petition cannot be completely decided. I am also of opinion that he being merely a proper party, can be added as defendant irrespective of the question of limitation under Section 22 of the Limitation Act.

In the matter of addition of parties the provisions of the Code of Civil Procedure would apply as mentioned in Section 90(2). It is contended that as Section 92 does not mention the joinder of the parties, the Tribunal cannot deal with it. But section 92 does not control section 90(2). Section 92 merely clothes the Tribunal which is a temporary court, with the powers of a court under the Code of Civil Procedure. I cannot reconcile myself to the position that any court or tribunal can exist under such great limitations as to debar it from entering into the question of misjoinder or non-joinder of parties. I agree with respect with the observations in *Cropper Vers Smith*, 26 Chancery Division 700 at 710 "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace".

For the various reasons stated above, I hold that section 82 is not mandatory and the non-joinder of Shri Pradip is not fatal to the maintainability of the Election Petition.

HIGH COURT, PATNA,

(Sd) ADITYANARAYAN LAL, *Member*.

The 27th July, 1953.

Typed at my dictation, and revised and corrected by me.

(Sd) ADITYANARAYAN LAL, *Member*.

JUDGMENT OF THE TRIBUNAL

According to the majority opinion of the members, the Tribunal finds that the election petition is not maintainable for reason of non-compliance with the mandatory provisions of Section 82 of the Representation of the People Act, 1951.

The Tribunal, in accordance with the unanimous views of the members, finds that respondent No 1 was not disqualified for being chosen as a member of the Bihar Legislative Assembly and that his nomination was not improperly accepted.

The election petition, therefore, fails.

ORDER.

The election petition be dismissed. In the circumstances of the case, no cost is awarded to respondent No 1.

(Sd) BASU PRASAD, *Chairman*.

(Sd) HARGOBIND PRASAD SINHA, *Member*.

(Sd) ADITYANARAYAN LAL, *Member*.

HIGH COURT, PATNA,

The 27th July, 1953

Typed at my dictation and revised and corrected by me.

(Sd) B. PRASAD. *Chairman*.

[No 19/174/52-Elec.III/493.]

By Order,

P. R. KRISHNAMURTHY, Asstt. Secy.